

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”
MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION
_____/

MDL No. 2672 CRB (JSC)

**ORDER DENYING MOTION TO
COMPEL**

This Order Relates To:
MDL Dkt. Nos. 6867, 6888, 6892

BONDHOLDER ACTION

A Volkswagen bondholder, in a proposed class action, has sued Volkswagen and two of the company’s former officers, alleging securities fraud arising out of the 2015 disclosure of the company’s diesel emissions fraud. Michael Horn, the former CEO of Volkswagen Group of America, Inc., is one of the officer defendants.

Pending before the Court are several discovery letter briefs regarding the bondholder’s demand to Mr. Horn to produce 118 documents that Volkswagen’s attorneys selected and shared with Mr. Horn’s attorneys in October 2015, in connection with Mr. Horn’s sworn testimony before Congress while he was still Volkswagen’s CEO. Having reviewed the parties’ submissions and the relevant caselaw, the Court finds that Volkswagen’s compilation of these 118 documents is privileged opinion work product. While the documents themselves are not privileged, their compilation clearly is.

The absolute work product privilege protects from discovery an attorney’s “mental impressions, conclusions, opinions, or legal theories.” Fed. R. Civ. P. 26(b)(3). Requiring Mr. Horn or Volkswagen to identify the 118 specific documents that Volkswagen’s attorneys shared with Mr. Horn’s attorneys would reveal Volkswagen’s attorneys’ “mental impressions, conclusions, opinions, or legal theories;” namely, their mental processes about what documents

1 were most important for Mr. Horn's personal attorneys to review in connection with his
2 congressional testimony. The absolute work product privilege protects against this disclosure.
3 *See, e.g., Sporck v. Peil*, 759 F.2d 312, 315–17 (3d Cir. 1985); *Greer v. Elec. Arts, Inc.*, No. C10-
4 3601 RS (JSC), 2012 WL 6131031 *2 (N.D. Cal. Dec. 10, 2012).

5 The bondholder's reliance on *Waymo v. Uber*, No. 17-CV-00939-WHA (JSC), 2017 WL
6 2485382 at *12–14 (N.D. Cal. June 8, 2017), is misplaced. First, there was no attorney
7 compilation of documents at issue in that decision. Second, to the extent that the work product
8 doctrine applied in *Waymo*, its protections were waived by disclosure of the relevant documents to
9 an adversary. Third, the defendants in *Waymo* were seeking to prevent disclosure of all the
10 sought-after documents. Here, in contrast, Volkswagen does not contend that the documents
11 themselves are privileged, and the company intends to produce them (if it has not already done so)
12 as responsive to the bondholder's document requests. Volkswagen merely objects to disclosing
13 these documents in a form that would reveal that they were the specific documents that
14 Volkswagen's attorneys compiled and gave to Mr. Horn's personal attorneys before Mr. Horn's
15 congressional testimony in his capacity as Volkswagen's CEO. *Waymo* is not analogous, and as
16 the compilation in question is protected opinion work product, the bondholder's motion to compel
17 its production is DENIED.

18 The bondholder's letter brief alludes to a dispute as to how Volkswagen is producing
19 documents responsive to document requests, and also asks for further briefing on the application
20 of the common interest privilege. If the bondholder wishes to have an informal telephone
21 discovery conference, at which the Court would attempt to give guidance without a formal written
22 submission, it should contact the Court's Courtroom Deputy by email, copying counsel for all of
23 the parties in this action.

24 **IT IS SO ORDERED.**

25 Dated: December 3, 2019



JACQUELINE SCOTT CORLEY
United States Magistrate Judge